IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 6TH JUNE 2007 / 16TH JYAISHTA 1929

WP(C).No. 23928 of 2006(W)

PETITIONER:

M/S.PORIYATH LATEX,
MALLIKASSERY P.O., PAIKA, PALAI,
KOTTAYAM DISTRICT, REPRESENTED BY ITS
PROPRIETOR, MR. TOMY FRANCIS.

BY ADV. SRI.JOBI JOSE KONDODY
SRI.V.GIRI

RESPONDENTS:

1. THE DISTRICT COLLECTOR,
(CHAIRMAN OF SINGLE WINDOW CLEARANCE BOARD),
COLLECTORATE P.O., KOTTAYAM-2,
KOTTAYAM DISTRICT.

2. THE ENVIRONMENTAL ENGINEER,
KERALA STATE POLLUTION CONTROL BOARD,
ST. ANTONY'S COMPLEX, NAGAMPADOM, KOTTAYAM DIST.

3. THE DISTRICT MEDICAL OFFICER OF HEALTH,
COLLECTORATE P.O., KOTTAYAM DISTRICT.

4. THE MEENACHIL GRAMA PANCHAYATH,
REPRESENTED BY ITS SECRETARY, EDAMATTOM P.O.,
PALAI, KOTTAYAM DISTRICT.

5. THE SECRETARY, MEENACHIL GRAMA
PANCHAYATH, EDAMATTOM P.O., PALAI,
KOTTAYAM DISTRICT.

Addl. 6. VILAKUMADAM EAST RURAL DEVELOPMENT SOCIETY (REGD.),
CHATHAMKULAM, PO.MALLIKASSERY, KOTTAYAM DIST.,
PIN:686577, REP. BY ITS PRESIDENT, T.K.PRABHAKARAN NAIR.

ADDL.6TH RESPONDENT IMPLEADED VIDE ORDER IN IA.14057/06
DT.11.10.06

R1 & R3 BY GOVERNMENT PLEADER SRI.SHYSON P.MANGUZHA
R2 BY ADV.SRI.M.K.CHANDRAMOHAN DAS, SC, PCB
R4 & R5 BY ADV.SRI.SHAJI THOMAS PORKKATTIL
SRI.BINU PAUL
ADDL.R6 BY ADV.SRI.K.RAMAKUMAR
SRI.MOHAN PULICKAL

THIS WRIT PETITION (CIVIL) HAVING OME UP FOR ADMISSION ON 06/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**PIUS C. KURIAKOSE, J.**

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W.P.(C) No.23928 OF 2006-W

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DATED THIS THE 6TH JUNE, 2007

**JUDGMENT**

The proprietor of a centrifuging-cum-latex creaming unit, a small scale industry has filed this Writ Petition under Article 226 of the Constitution, arraying the Chairman of the Single Window Clearance Board (SWCB) constituted under the Kerala Industrial Single Window Clearance Boards and Industrial Township Area Development Act 1999 for Kottayam District, the Environmental Engineer of the Pollution Control Board, the District Medical Officer, the Meenachil Grama Panchayat and the Secretary of that Panchayat, seeking inter alia a direction to the 5th respondent-Secretary of the Panchayat either to renew Ext.P2 licence already issued for the year 2006-07 for operating a 50 HP electric motor or to issue a fresh licence; and a writ of mandamus commanding the 1st respondent-SWCB to issue a deemed Panchayat licence for running the petitioner's industry.

2. The petitioner states that the industry was established in the year 2004, after obtaining "Ext.P1 consent to establish" from the 2nd respondent-PCB. It is claimed that all necessary licences for establishing the unit including the Panchayat licence were obtained by him and Ext.P2 is copy of the Panchayat licence for the year 2005-06.

Ext.P3 is copy of the licence issued by the Rubber Board, valid upto 31.3.2007 for acquiring rubber for the proposed industry. The petitioner points out that as per Ext.P1, permission is given for processing 550 tonnes of field latex per month and on finding that 550 tonnes of latex is available in the local market, a 50 HP motor was installed so that the permitted quantity can be produced. Ext.P4 consent to operate, valid upto 31.12.2007, was obtained in this regard from the 2nd respondent-PCB. The petitioner complains that his application for renwal of Ext.P2 licence after its expiry has not been considered by the 5th respondent due to political animosity. It is alleged that due to the change in the political colour of the Committee governing the Panchayat after Ext.P2 licence was issued, licence is not being renewed due to the reason that the petitioner does not owe allegiance to the political group presently at the reigns in the Panchayat. Ext.P5 letter dated 7.9.2005 was submitted by the petitioner to the Panchayat for renewal of licence by way of permitting him to operate 50 HP motor. After submitting Ext.P5 to the Panchayat, a minimum guarantee agreement Ext.P7 was executed with the K.S.E.B. for an amount of Rs.1,65,017/- and the petitioner has become obliged to pay the entire amount shown in the minimum guarantee agreement before the line is charged. Though after

submitting Ext.P7 to the K.S.E.B., the 5th respondent was approached several times seeking renewal of Ext.P2 with permission to operate 50 HP motor, the Panchayat declined such renewal and accordingly the petitioner approached the 1st respondent for obtaining deemed licence for running the industry. The petitioner claims that the matter was considered by the SWCB in several meetings and in the meeting held on 29.11.2005, the Committee after considering the matter in detail decided to issue Panchayat licence to the petitioner subject to production of energisation order from the Electrical Inspectorate. It is submitted that the President of the Panchayat was present in all these meetings of SWCB and Ext.P8 minutes of the meeting of the 1st respondent-SWCB dated 14.12.2005 is relied on. After obtaining energisation order, the matter was once again placed before the SWCB meeting held on 25.2.2006. In that meeting, on account of the objections raised by the President of the Panchayat, the SWCB decided to conduct a joint inspection in the unit by the General Manager, District Industries Centre and the 2nd respondent (Environmental Engineer of the PCB). Accordingly a joint inspection was conducted and a report was submitted before the SWCB. Ext.P9 is copy of the above joint inspection report dated 25.2.2006 in which it is stated that the plant installed by the petitioner does not generate pollution and that

the same is situated in the middle of land having an extent of 11.5 acres and that there are no residences within 100 metres of the unit. Under Ext.P9 the petitioner is directed to construct a compound wall having height of 1 foot for avoiding even the remote possibility of water flowing from the factory site to the nearby canal. Under Ext.P9 it is suggested that the SWCB issues deemed licence with appropriate directions regarding strict adherence to the conditions prescribed by the PCB. Upon Ext.P9 being placed before the meeting of the SWCB held on 16.6.2006, the matter was once again considered in detail and it was decided after hearing the 5th respondent also that the Panchayat be directed to issue licence to the petitioner upon the petitioner constructing compound wall on the western side of the unit as suggested in Ext.P9. Ext.P10 is copy of the minutes of the meeting of the SWCB held on 16.6.2006. The petitioner claims that as against the direction to construct compound wall having a height of 1 foot, he would construct compound wall height of 1 ½ feet at a length of 176 metres on the western side. Thereafter, the Assistant District Industries Officer, Palai inspected the construction of the compound wall and submitted Ext.P11 report dated 1.8.2006 to the General Manager, District Industries Centre. The petitioner is aggrieved in that even though the General Manager, DIC has placed Ext.P11 before

the SWCB, he has not been given renewal of licence by the 5th respondent and much less any fresh licence. In the meanwhile, **Ext**.P12 notice dated 14.8.2006 was received by the petitioner from the Section Engineer of the K.S.E.B., requesting that electrical completion and test report for taking electrical energy be submitted at the earliest lest the Board should change UCM. Since Panchayat licence is mandatory for obtaining electrical completion certificate, a further representation Ext.P13 dated 23.8.2006 was submitted by the petitioner before the SWCB seeking issuance of a deemed Panchayat licence. The petitioner also relies on Ext.P14 certificate dated 12.8.2005 of the D.M.O. which is to the effect that from the public health point of view, there is no chance of any contamination from the unit.

3. Respondents 4 and 5 filed a detailed counter affidavit on 16.11.2006. I directed the 1st respondent to place Ext.P13 representation and all records relating to the petitioner's application for issuance of final recommendation under Section 8(3) of Act 5 of 2000 in the subsequent meeting of the SWCB and facilitate a decision whether to issue a final recommendation to the 4th respondent-Panchayat regarding issuance of licence to the petitioner. When copy of that interim order was produced before the 1st respondent, a

meeting of the SWCB was held and an order was passed rejecting the petitioner's application on the basis of the report of a Sub Committee which was constituted by the 1st respondent. Producing a copy of the minutes of the meeting held on 22.11.2006 as **Ext**.P16, the petitioner filed an application seeking amendment of the Writ Petition so as to incorporate the following prayers:- i) to quash **Ext**.P16; and ii) declare that Ext.P10 order passed by the Single Window Clearance Board is final and direct the 4th respondent-Panchayat to issue licence to the petitioner's unit for running the same with 50 HP motor. The amendment sought for was allowed. The petitioner has also produced Ext.P17 which is copy of the report of the Sub Committee on the basis of which **Ext**.P16 order was issued by the SWCB. The petitioner points out that the Sub Committee consisted of 5 members out of which 3 members were in favour of granting licence to him. The other two members who opposed the grant of licence to the petitioner were the President of the 4th respondent-Panchayat as well as an officer from the Additional District Magistrate's Office. It is contended that the President of the Panchayat who was all along opposing grant of licence to the petitioner's unit should not have been made a member of the Sub Committee constituted by the 1st respondent. It is also contended that Act 5 of 2000 does not confer powers on the 1st

respondent to constitute a Sub Committee after final orders are passed by the SWCB. It is pointed out that Ext.P16 order was passed by the SWCB in gross violation of the directions of this Court in Ext.P15 interim order. The petitioner complains that this Court directed the SWCB to hear the petitioner and though the petitioner and his representative were present on the date of hearing, the petitioner was not permitted even to enter into the meeting hall nor was he heard before the order was passed.

4. As already stated even prior to the amendment respondents 4 and 5 filed counter affidavit denying the averments in the writ petition and repudiating the grounds raised therein. Ext.R4(a) produced along with the counter affidavit is a copy of the licence application dated 17.12.2003 submitted by the petitioner for storage of rubber latex in his building having Door No. V/329-A. It is submitted that licence was granted as per Ext.R4 (a) for one year and thereafter renewed for the year 2004 – 05. Ext.R4 (b) is a copy of fresh application dated 2.3.2005 submitted by the petitioner for using 5 HP electric motor in his establishment. Ext.R4(b) application was also allowed by the Panchayat. The counter affidavit states that the Panchayat has no objection for renewing the licence granted pursuant to Ext.R4 (b) which is a licence for using 5 HP electric motor. What

the Panchayat is opposed is the request of the petitioner that his establishment which is presently one for latex collection be converted as centrifuged Rubbery Latex factory by erecting plant and machinery and by using 50 HP motor electric energy. The counter affidavit very stiffly denies the allegation that it is on account of political rivalry that the present Panchayat Committee controlled by the UDF is harassing the petitioner. It is pointed out that the petitioner himself belongs to the UDF and is a Block Secretary of the Congress I Party. The counter affidavit further points out that when Ext.R4 (b) application was submitted by the petitioner, he had not constructed the factory building nor had he installed the machinery for manufacturing centrifuged rubbery latex factory. Subsequent to Ext.R4 (b) application, the Panchayat received a mass petition signed by 568 persons belonging to the locality. Ext.P2 licence is not a licence issued by the Panchayat for 50 HP Centrifuged Rubber latex factory with its plant and machinery. It is a licence for using 5 HP motor only. Apart from submitting mass petition, the DYFI activists of the locality staged dharna in front of the Panchayat office. The Human Rights and Nature Protection Society functioning at Edamattom within the area of the Panchayat also submitted another mass petition signed by 250 persons. Lot of complaints regarding contamination of the water in

the nearby Ponnozhukum Thodu and the well constructed by the water authority for supplying water to the residents of the locality were raised. Pursuant to these complaints the Secretary of the Panchayat conducted inspection which revealed that the petitioner who had been permitted to erect and use 5 HP motor had not then far erected such motor at all. Therefore a notice was issued to the petitioner, who submitted Ext.R4(c) undated reply undertaking that he will not erect or operate any machinery without prior permission from the Panchayat in that regard. The counter affidavit refers to Section 233 (1) of the Panchayat Raj Act and submits that it is obligatory that the permission of the Panchayat is obtained before the factory is constructed and machineries are installed. Ext.P4 licence was obtained by the petitioner even before the Panchayat had been moved for permission to construct the factory building. It is contended that Ext.P5 is a highly misleading application. It is not an application for construction of factory and for installation of machinery as contemplated under Section 231, which are to be submitted in prescribed form giving prescribed details. On coming to know that Ext.P8 decision was taken by the SWCB to recommend the issue of licence to the petitioner the Panchayat Committee resolved on 11.1.2006 vide Ext.R4 (e) decision to request the SWCB to cancel

Ext.P8 decision. It was pursuant to Ext.R4 (e) that SWCB in its meeting held on 25.2.2006 decided to conduct joint inspection of the proposed site by the General Manager and the Environment Engineer of the Pollution Control Board. Even though the District Collector who is the Chairman of the SWCB had directed the members of the Joint Inspection Committee to inform the Panchayat also before the inspection is conducted the Panchayat was never informed about the inspection. The Panchayat was not permitted to participate in the inspection. The objection raised by the Panchayat and the local residents who had gathered near the property during inspection were not considered at all. It is alleged that the inspecting Committee did not inspect the well and pump house which is situated hardly 60 meters from the site. Ponnozhukum thodu which is main water channel of the Meenachil river passing hardly 60 meters away from the site is described in the report as a canal. Considering all these, Ext.R4(f) objection was submitted to the Chairman of SWCB by the Panchayat on 23.3.2006. On 31.1.2006 the Grama Sabha of Ward No. V of the Panchayat where factories proposed to be started took a unanimous decision not to grant licence to the petitioner for starting rubber latex factory and to submit a mass petition to the District Collector. After receipt of Ext.P9 inspection report, meeting of SWCB

was convened on 16.6.2006. In that meeting Ext.R4 (g) objection dated 15.6.2006 was submitted by the President of the Panchayat. Ignoring Ext.R4(g) SWCB took Ext.P10 decision. The counter affidavit points out that after Ext.P10, the petitioner filed a further application dated 5.7.2006 even before the direction in Ext.P10 regarding construction of compound wall had been complied with. On that application the Panchayat committee took Ext.R4 (h) decision on 10.7.2006 deciding not to issue licence for starting the factory at the proposed site. Thereafter, SWCB decided to schedule meeting on 25.8.2006. But the notice regarding that meeting was sent to the President of the Panchayat only on 23.8.2006, as a result of which the notice was received in the Panchayat office only on 26.8.2006. It is contended that the primary authority to grant permission for construction of factory or for installation of the machinery is the Panchayat itself. The petitioner is not entitled to approach the SWCB directly bypassing the statutory authority under the Panchayat Raj Act. Ext.P14 certificate issued by the DMO is challenged stating that the DMO to the best of the Panchayat's knowledge did not conduct any inspection and that certificate does not reflect consideration with application of mind to various series of objection which had been raised. As regards the petitioner's transaction with the KSEB, it is

contended that all the agreements with the KSEB and other authorities are executed by the petitioner without obtaining permission from the Panchayat under Section 233(1) for construction of factory or installation of machineries. The factory has been constructed and plant and machineries have been installed, it is pointed out, in violation of undertaking in Ext.R4(c). It is then submitted that on 15.6.2006 the President of the Panchayat submitted a representation to the District Collector, who is also the Chairman of SWCB, about the secret inspection by the District Industries' General Manager and by the 2nd respondent and about delayed dispatch of the notice of intimation regarding the meeting held on 25.8.2006. The District Collector, being convinced, directed not to issue deemed licence on the strength of Ext.P10 and decided to hear the objection of the Panchayat and the residents. SWCB will be considering the issue after inspection of the site by the District Collector.

5. Ext.P15 interim order was passed by this court considering the above counter affidavit and after hearing the parties. After amendment of the writ petition, the respondents 4 and 5 have filed another counter affidavit on 20.1.2007. It is contended that Ext.P16 order is not a final order and that the petitioner has an effective and efficacious alternative remedy by way of appeal before the State Board

under Section 11 of the Act. Referring judgments of this court in **Valsamma Thomas v. Additional District Magistrate** (**1997 (2) KLT 979)** and **Geetha Timbers v. State of Kerala (1990 (1) KLT 402(FB)** , it is pointed out that judicial review, which is contemplated in exercise of the powers under Article 226, is not a review of the decision of the administrative authority, but the same will be confined to the examination of the decision making process to ensure whether the petitioner received a fair treatment. Several disputed questions of fact such as whether the functioning of the proposed centrifuged Rubber Latex factory will cause pollution to the drinking water in the well and the pump house situated nearby, thereby contaminating water in the nearby Ponnozhukum Thodu, all of which require elaborate consideration based on evidence will arise. The appellate authority under Section 11, it is pointed out, is vested with ample power to take evidence and finally decide the issue on the basis of materials placed before it. It is then contended that Ext.P8 decision was taken by the SWCB without consulting the local authority and without knowing the views of the Panchayat and that since **Ext**.P10 decision is based on Ext.P8 recommendation, **Ext**.P10 is also unsustainable and this was why it was decided to appoint a Sub Committee for inspecting the site for submission of a report. This

Court passed the interim order after perusing the entire files and records of the SWCB and finding that Ext.P10 had not attained finality. The Sub Committee, it is stated, visited the site, heard the objections of the residents and submitted Ext.P17 report. **Ext**.P17 was considered by the SWCB at its meeting on 22.11.2006 which discussed the report. The members agreed with the views of the Additional District Magistrate and the Panchayat President and finally decided to reject the application for licence. Ext.P16 decision is the final decision under Section 10 of Act 5/2000. The counter affidavit goes on to reiterate most of the contentions raised in the counter affidavit which had been filed prior to the amendment of the Writ Petition. Documents Exts.R4(a) to R4(g) are once again marked and the contentions raised against the report of the D.M.O. and those raised in the context of Section 233(1) of the Panchayat Raj Act are also reiterated. It is alleged that the Writ Petition is filed stating incorrect facts, making misleading statements, false averments and by suppressing material facts. It is even prayed that suo motu action be initiated for filing false affidavit regarding his own political allegiance. Ext.R4(i) which is copy of the list of office-bearers of the Bharanganam Block Congress (I) Committee is produced along with a separate I.A. to bring home the contention that the petitioner is an office-bearer of

the Block Committee of the Congress Party which is a constituent of the U.D.F.

6. M/s.Vilakkumadam East Rural Development Society through its President Sri.Prabhakaran Nair was impleaded as the additional 6th respondent upon an application filed by them stating that the establishment of the factory proposed by the petitioner would generate immense water, air and noise pollution, deleteriously affecting the peaceful and healthy life of the villagers, the inhabitants of Ward Nos.4, 5, 6, and 7 of the Panchayat and that the Society and similar units affiliated to the Vanchinad Community Centre have been spearheading the opposition against the proposed factory from the beginning and therefore is interest in the Writ Petition. The additional 6th respondent has filed a counter affidavit supporting all the contentions raised by the Panchayat through their counter affidavit. Ext.R6(a) copy of a representation dated 19.8.2005 submitted by Vanchinad Community Centre against the proposal to establish the factory is produced. Ext.R6(b) is copy of another representation submitted by the residents of Ward No.5 of the Panchayat on 17.12.2005. Ext.R6(c) is copy of the minutes of the meeting of the Grama Sabha of Ward No.5 of the Panchayat wherein it was resolved to submit a petition to the District Collector against the establishment

of the factory by the petitioner. It is claimed that the Panchayat enquired into the grievances and objections aired by the Villagers and found that their fears were well-founded and it was after having been fully convinced of the possible health hazards resulting from the functioning of the factory that the Panchayat decided not to grant licence to the petitioner. The counter affidavit refers to Schedule-III of the Panchayat Raj Act and points out that it is the mandatory function of the Panchayat to preserve and improve public health and ensure environmental hygiene and also to ensure proper water supply for satisfying the needs of the villagers. The Ponnozhukum thodu which flows just 60 metres away from the proposed factory site is the main water channel which caters to the water needs of the inhabitants of ward Nos.4, 5 and 6 of the Panchayat. The well and the pump-house of the Vilakumadam Drinking Water Supply Scheme supplies water to the inhabitants of these Wards as also to various other institutions in the neighbourhood situated very near to the proposed site. It is contended that issuance of **Ext**.P1 consent by the Pollution Control Board will not entitle the petitioner to get licence from the Panchayat automatically. The Panchayat cannot turn blind and deaf to the outcries of the public. Section 232 of the Panchayat Raj Act is referred to and it is contended that for manufacture, storage and sale

of rubber and rubber products, a licence is required and the Kerala Panchayat Raj (Dangerous and Offensive Trades and Factories Licensing) Rules is necessary from the Panchayat. It was for the petitioner to have obtained permission from the Panchayat before obtaining clearance certificate from other statutory authorities. It is well within the powers of the Panchayat to decide whether permission should be granted or not for establishing a factory upon consideration of fact-situation from the perspective of public interest and the judgment of the Supreme Court in **Action Council v. Benny Abraham** (2002 (2) KLT 228) is referred.

7. Hearing the submission of the learned counsel for the petitioner that the directions of this Court in Ext.P15 interim order were violated by the 1st respondent in not hearing the petitioner and in not even permitting the petitioner or his representative to be present in the conference hall when the 1st respondent was considering the item, I directed the Chairman of the 1st respondent-Board to file an affidavit answering two specific questions. Sri.Raju Narayanaswamy-the then Chairman of the 1st respondent-Board has filed a counter affidavit which is being referred to in detail elsewhere in this judgment.

8. Very elaborate submissions were addressed before me by the counsel for the parties, Sri.V.Giri and Sri.Jobi Jose Kondody for the

petitioner, Sri.Shaji Thomas Porkattil for the Panchayat and the learned Government Pleader for the 1st respondent. Even though on three occasions the case was posted by me specifically for hearing the arguments of the learned counsel for the additional 6th respondent who had preferred appeal before the Division Bench against Ext.P15 interim order, neither Sri.Mohan Pulickkal, learned counsel for the 6th respondent nor Sri.K.Ramakumar, who was stated to have been engaged to argue on his behalf, addressed me. But it will be noticed that Mr.Shaji Thomas Porkattil, counsel for the Panchayat addressed exhaustive submissions covering the counter affidavit filed by the additional 6th respondent also.

9. In support of the submission that the Writ Petition is not maintainable in law on account of the existence of an effective alternate remedy and the further submission that in judicial review this Court reviews not the decision of the administrative authority but reviews only the decision-making process, Sri.Shaji Thomas cited various judicial precedents including the judgment of the Full Bench in **John v. Liquidator** (2006 (1) KLT 11), judgment of this Court in **Malayala Manorama Co. Ltd. v. Asst. Commr.** (2006 (3) KLT 581) and the judgments of Division Benches in **Valsamma Thomas v. Addl. Dist. Magistrate** (1997 (2) KLT 979), **District Executive**

**Officer v. Abel** (2006 (2) KLT 758), **George v. Munsiff's Court, Perumbavoor** (2006 (1) KLT Sh. Notes case No.48, p.44). Mr.Giri and Mr.Jobi also did not lag behind in citing judicial precedents. As regards the judgment in **Malayala Manorama's** case, Mr.Jobi submitted that the same has been overruled, but, according to Mr.Shaji, the overruling is only in a limited sense. In fact, most of the judgments cited before me by Mr.Giri such as **U.P.S.E.Board v. Hari Shanker** (AIR 1979 SC 65), **Ashoka Marketing Ltd. v. Punjab National Bank** (AIR 1991 SC 855) and **Saij Gram Panchayat v. State of Gujarat** [(1999) 2 SCC 366] were regarding the impact of the provisions of Act 5 of 2000 on the Panchayat Raj Act and regarding the argument that the final recommendation of the SWCB is binding on the Panchayat. Mr.Jobi placed before me copies of the notice issued to the petitioner from the Pala Branch of the State Bank of Travancore to support his argument that due to non-functioning of the industry, the petitioner has not been able to pay the loan amount and that recovery proceedings have been threatened against him. He also placed before me copy of notice dated 15.3.2007 issued by the Rubber Board threatening to cancel the licence issued by the Rubber Board on the reason that the industry has not been started so far. Mr.Giri also made available for my perusal copy of the judgment of the Division

Bench in W.P.(C)No.27334 of 2003 (**Pepsico India Holdings Pvt. Ltd. v. State of Kerala**) (since reported in 2007 (2) KLJ 218).

10. One of the arguments which was seriously addressed before me by Sri.V.Giri and Sri.Jobi Jose was that Ext.P10 order is a final recommendation issued by the SWCB in terms of Section 8(2) of Act 5 of 2000 and that Ext.P10 will be binding on the Panchayat in view of Section 10 of Act 5 of 2000. I have no doubt that a final recommendation issued by SWCB under Section 8(2) of Act 5 of 2000 shall be binding on the licensing authority. But I find it difficult to accept the argument of the learned counsel that Ext.P10 is such a final recommendation. This is because Ext.P16 subsequent order of the SWCB is issued on the basis of Ext.P15 interim order passed by this Court. I passed Ext.P15 order, after hearing both sides in detail and after going through the relevant files of the SWCB which were made available for my perusal. I could gather from the files that the Chairman of the SWCB was somewhat impressed by the complaint of the Panchayat that the President of the Panchayat who is an important member of the SWCB did not have notice of the meeting in which Ext.P8 decision was taken and his further complaint that there was no sufficient notice to the Panchayat regarding the joint inspection conducted by the Sub Committee consisting of the General Manager,

DIC and the Environmental Engineer of the Pollution Control Board. I found that the Chairman of the SWCB was thinking in terms of reconsidering Ext.P10 and I passed Ext.P15 interim order. Pursuant to Ext.P15, the SWCB issued Ext.P16 order deciding to reject the petitioner's application. One of the reliefs which the petitioner seek through the Writ Petition which was got amended after producing copy of Ext.P16 is to quash Ext.P16. The very maintainability of the Writ Petition seeking quashment of Ext.P16 is challenged by the Panchayat on the reason that under Section 11 of Act 5 of 2000 the petitioner is having an alternate remedy. It is also seriously contended that the petitioner's version that the Panchayat has political animosity towards the petitioner is contrary to truth. True, an alternate remedy is available against **Ext.**P16. It is also true that the petitioner's version regarding political animosity towards him is contrary to truth. But it has to be seen that there are more compelling reasons than one for quashing Ext.P16 in the present jurisdiction itself.

11. What this Court had directed under Ext.P15 was that the SWCB shall take a fresh decision on the question as to whether final recommendation under Section 8(2) of Act 5 of 2000 should be issued regarding issuance of licence to the petitioner and that such a decision shall be taken in a meeting, notice regarding which is given sufficiently

early to the 4th respondent-Panchayat so as to ensure that the President of the Panchayat also participates in the meeting. I had directed that fresh decision will be taken considering all the available materials and the rival contentions which may be urged in the meeting on behalf of the petitioner and also on behalf of the Panchayat and that at any rate the meeting shall be convened within three weeks of receiving copy of Ext.P15 order. It is clear that Ext.P16 order passed by the SWCB has been passed without hearing the petitioner or the petitioner's representative and without even permitting the petitioner or their representative and without even permitting the petitioner or the petitioner's representative to attend the meeting in which Ext.P16 decision was taken. The Chairman of the 1st respondent-Board has filed an affidavit before this Court on 13.2.2007 in response to a direction in that regard issued by this Court. In fact, the learned counsel for the petitioner submitted that the Chairman of the 1st respondent did not permit the petitioner or the petitioner's representative to be present in the conference hall and was not inclined to hear the petitioner or his representative at all even though the Chairman's attention was drawn to his obligation under Section 15 to afford an opportunity for hearing to the petitioner. On hearing the above submission, I directed the Government Pleader to seek

instructions separately from Mr.Raju Narayanaswamy, the then Chairman of the Board and also from Sri.C.Alexander, District Labour Officer, Kottayam on the following two specific issues:-

"1. whether the writ petitioner Sri.Tomy Francis was allowed to be present when the Single Window Clearance Board met and discussed on 22.11.06 on the issue of granting final recommendation to M/s.Poriyath Latex, Mallikassery;

2. whether Sri.Tomy Francis had been heard by Single Window Clearance Board before a decision was taken;"

and I posted the case was posted 2.2.2207. On that day an adjournment was sought for by the learned Government Pleader and accordingly the case was adjourned to 9.2.2007. The learned Government Pleader submitted that the instructions which had been received by him from the District Collector are not clear enough and accordingly the Government Pleader sought further time. It was under such circumstances that I directed the then District Collector-Chairman, SWCB to file a counter affidavit answering the two specific issues. What the then District Collector contends through his counter affidavit is that in Ext.P15 order this Court had not issued any specific directions to the District Collector for hearing the petitioner and therefore the District Collector assumed that it will suffice if a fresh

decision is taken hearing only the Panchayat and considering the contentions raised by both sides. The District Collector explains that this was why the 4th respondent's objections were heard and the petitioner's case was examined in detail as disclosed from his application and he has stated that he did not mean to disobey the directions of this Court and he agrees that if further directions are issued by this Court, meeting of the SWCB will be convened again for enabling the petitioner to urge his contentions personally. Notwithstanding the above offer, the District Collector has also contended through his counter affidavit that the Writ Petition will not be maintainable in view of the existence of the alternate remedy of appeal under Section 11.

12. I am not at all impressed by the impressions of the then Chairman of the 1st respondent-Board of Ext.P15 order. An officer like him, reputed also for intelligence and comprehension could have understood on a reading of Ext.P15 that this Court wanted him to allow participation of the petitioner also in the proceedings. It is conceded that the petitioner was not only not heard but was not even permitted entry into the conference hall though he was very much present in the corridor when the issue was being considered inside the hall pursuant to Ext.P15.

13. On the merits also, I find it difficult to sustain Ext.P16. What is stated in Ext.P16 is that Ext.P17 report of the Sub Committee was discussed by the Board and that it is decided to reject the petitioner's application on the basis of the report of the Sub Committee. There were altogether five members in the Sub Committee: 1) President of the Panchayat; 2) Environmental Engineer of the Pollution Control Board; 3) President of K.S.S.I.A., Kottayam Unit; 4) P.Sajan Mathew, Additional District Magistrate, Kottayam; 5) G.Satish Chandran, General Manager, DIC, Kottayam. On reading through Ext.P17 report, the following aspects become clear:

1) The well and the pump house of the water supply scheme which provides water to the inhabitants of four Wards of the Panchayat are situated 500 metres away from the installations of the petitioner. The thodu in which the above well and the pump house are constructed flows at a distance of 50 to 60 metres from the boundary of the petitioner's property in which his installations are situated.

2. The total extent of the petitioner's property is 10 acres.

3. If the waste water from the petitioner's proposed factory flows into the thodu, the water in the water supply

well will become contaminated.

4. The petitioner has already established an effluent treatment plant as directed by the Pollution Control Board.

5. In response to the direction given in that regard by the Two Member Committee which submitted Ext.P9 inspection report, the petitioner has already constructed compound wall extending to a length of 100 metres on his western boundary on the side of the thodu. The height of the above compound wall is 1 ½ feet as against the height of 1 foot suggested in Ext.P9.

6. Vast majority of the local people who had gathered at the premises when the five member committee conducted the inspection were opposed to the commencement of the factory.

14. As already indicated, the 1st respondent appointed only five persons named hereinabove as Committee for conducting joint inspection. Report of the Committee can only be report of the members who constituted the Committee and not report of the general public who had gathered in the premises when the Committee conducted the inspection. The view of three members out of the five was that ensuring that the conditions and directions issued by the

Pollution Control Board are complied with strictly by conducting periodical inspections, licence can be given to the petitioner's factory for commencing its operations. The minority, viz., the President of the Panchayat and the Additional District Magistrate reported that under no circumstances licence can be given to the petitioner. The reason for the negative report of the President of the Panchayat and the Additional District Magistrate is obviously the opposition of the public to the proposal. The general public opposes the factory mainly on the reason that the water in the nearby thodu which provides drinking water to the residents of the four Wards of the Panchayat will become contaminated. The public also seem to have an apprehension that there will be air and sound pollution if the factory starts functioning. I do not find the negative report of the minority of the Committee to be based on any material which will show that under no circumstances the factory can be made pollution free. The obstinate stand that even if all the statutory authorities find that the preventive and precautionary measures taken by the petitioner are sufficient to rule out the possibility of pollution, licence will not be issued to the petitioner cannot be accepted. One of the objects of Act 5 of 2000 is to give relief to entrepreneurs from the delays and entanglements of bureaucratic procedure and to ensure that they are able to get the

requisite licences, clearances and certificates for setting up industrial undertakings speedily. Accepting the obstinate stand indicated above will be to defeat the legislative goal which is to encourage speedier establishment of industries certified by the statutory authorities to be safe. It is not difficult to understand, the concern of the local authority for the residents of its local area. But establishment of industries even if the same is in the private sector will, to a certain extent, be in public interest when it is considered that such industries will beneficial to citizens of the Panchayat directly or indirectly. Even otherwise, the fundamental right of a citizen to conduct industries of his choice after obtaining statutory permits and licences guaranteed under Article 19(g) of the Constitution is not be interfered with on grounds of public outcry or opposition unless such opposition is rational. The argument of Mr.Shaji Thomas is that Ext.P17 report was discussed threadbare by the SWCB and that the Board by majority decided to prefer the minority view in Ext.P17 and this was why Ext.P16 decision was taken. But I do not find any support for the above argument in Ext.P16. The Panchayat cannot be permitted to support Ext.P16 on the reasons not stated therein. In the counter affidavit submitted by the Chairman of the 1st respondent also, the above argument of the Panchayat is not seen accepted specifically. In

fact, Ext.P16 only says that the decision is taken in view of Ext.P17.

15. The local functionary of the Pollution Control Board which is the statutory authority on pollution related matters issued directions to the petitioner after local inspection regarding establishment of effluent treatment plant and construction of compound wall so as to prevent possible pollution and to make the factory pollution free. The above directions have been complied with by the petitioner to the satisfaction of the Pollution Control Board. Another statutory authority, the D.M.O. of Health has certified vide Ext.P14 that from the public health point of view there is no chance of any contamination from the proposed unit and has issued no objection to the petitioner for commencement of the factory subject to six conditions which the petitioner submits are being faithfully complied with by him. I do notice that the Panchayat has raised certain serious objections regarding Ext.P14 certificate. But the fact remains that the DMO has issued Ext.P14 on the basis of an inspection of the premises in question. The submission of Mr.Giri and Mr.Jobi that huge amounts have already been invested for purchase and installation of machineries and for construction of factory building and that the petitioner is obliged on the terms of the loan he had availed from a Nationalised bank to repay substantial amounts every month and that

the bankers are threatening legal action and the further submission of the learned counsel that even the Rubber Board has threatened the petitioner with immediate cancellation of the licence on the reason of non-commencement of the factory were not disputed before me. Those submissions are supported by documents. The stand of the Panchayat in this connection is that the petitioner having not obtained the permission of the Panchayat in advance, himself is to blame for the predicament in which he is placed now. The above stand is rather unkind and at any rate will be disheartening for an enthusiastic and optimistic entrepreneur who took the essential preliminary steps for commencement of an industry hoping that the local authority will not normally refuse licence once all other statutory authorities issue clearances. I do not find any reason to assume that the safeguards already suggested by the Pollution Control Board and the District Medical Officer of Health for preventing pollution from the petitioner's factory are inadequate. But, at the same time, I am of the view that the question as to whether the petitioner's factory in spite of safeguards so far taken by the petitioner will cause pollution can be answered conclusively only if a trial run of the factory is conducted. The issue whether a final recommendation under Section 8(3) of the Act 5 of 2000 shall be issued regarding the issuance of licence by

Panchayat to petitioner should be reconsidered by the 1st respondent. Since I find that Ext.P16 order has been passed in gross violation of the directions in Ext.P15 without hearing the petitioner and since I also find that Ext.P16 runs contrary to Ext.P17 joint report, though the same is avowedly issued on the basis of Ext.P17, it will not be appropriate to relegate the petitioner to remedies by way of appeal. The existence of an alternate remedy need not always be a bar for the invocation of the Constitutional jurisdiction of this Court in cases where it is seen that the order of the administrative authority is per se bad.

16. I quash Ext.P16 and direct the 1st respondent to take a fresh decision on the issue subject to compliance with the following directions:-

> A trial run of the petitioner's factory shall be conducted. The same shall be conducted under the supervision of the District Environmental Engineer of the Pollution Control Board and also an expert to be nominated by the 1st respondent and in the presence of the D.M.O. of Health or his representative. The trial run shall be conducted with notice to/in the presence of the authors of Ext.P17 report, the member who represents the Panchayat Ward in which the factory is proposed to be established,

three residents of that Ward to be nominated by the President of the Panchayat and three other residents of that Ward to be nominated by the Leader of the Opposition in the Panchayat Council, the petitioner, the 6th respondent-Sri.C.K.Prabhakaran Nair and the assisting staff of the Environmental Engineer of the Pollution Control Board and the expert nominated by the 1st respondent. The duration of the trial run shall be determined by the Environmental Engineer of the Pollution Control Board and the expert to be nominated by the Chairman of the 1st respondent. The 1st respondent will facilitate smooth conduct of the trial run by issuing necessary directions to senior police officers having jurisdiction over the area. Once the trial run is completed, separate reports regarding the same shall be submitted to the Chairman of the 1st respondent-Board by the Environmental Engineer of the Pollution Control Board, the expert to be nominated by the Chairman of SWCB and also by the D.M.O., with copies to the petitioner, the Panchayat and also the 6th respondent. The petitioner, the Panchayat and the 6th respondent will file objections, if any, to those reports before the 1st

respondent within 10 days of receiving copies of the reports. The Chairman of SWCB shall take up the question of issuing final recommendation under Section 8(2) of Act 5 of 2000 regarding the petitioner's proposed factory after three weeks of receiving reports from the Environmental Engineer, the expert and the DMO. In that meeting fresh decision will be taken on the issue covered by Ext.P16, considering the entire materials on record including the reports and the petitioner, the President of the Panchayat and the 6th respondent shall be given notice regarding the meeting. All the three of them shall be heard personally by the SWCB and all of them shall be permitted to submit brief notes of their arguments and those notes also shall be considered by the Board. Decision on the basis of the hearing as directed above shall be taken by the SWCB without delay and once decision is taken, the same shall be communicated to the petitioner, the Panchayat and the 6th respondent.

The Writ Petition is allowed as above, but, in the circumstances, without any order as to costs.

tgl/dpk **(PIUS C.KURIAKOSE, JUDGE)**

**PIUS C. KURIAKOSE, J.**

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W.P.(C) No.23928 OF 2006-W

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DATED THIS THE 20TH FEBRUARY, 2007

**ORDER**

The District Collector who is the Chairman of the Single Window Clearance Board has filed a counter affidavit pursuant to this Court's order dated 9.2.2007. It is clear on a reading of that counter affidavit that the grievance of the petitioner that Mr.Tomy Francis, its proprietor was neither heard nor even permitted to be present while the Single Window Clearance Board deliberated the issue is genuine. The District Collector has stated in para.5 of the counter affidavit that the direction of this Court in its interim order was only that notice regarding the next meeting of the Single Window Clearance Board shall be issued sufficiently early to the President of the Panchayat so as to ensure that he is also able to participate in the meeting. The District Collector states that the further direction was that decision will be taken, taking into account all materials available and the rival contentions which may be urged at the meeting on behalf of the petitioner and also on behalf of the Panchayat. In short, what the District Collector says is that

there was no specific direction in this Court's order to hear the petitioner or to permit the petitioner to be present. The Collector concludes the counter affidavit by submitting that there is no disregard or disobedience on his part in not allowing the petitioner to be heard or to be present in the meeting on 22.11.2006 and that if this Court issues further directions, a meeting of the Single Window Clearance Board will be convened again so as to enable the petitioner to urge its contentions personally, apart from submitting that as per Section 11 of the Industrial Single Window Clearance Boards and Industrial Township Area Development Act, 1999 the aggrieved person has remedy by way of appeal to the State Board.

2. Sri.V.Giri, learned counsel for the petitioner would submit that the District Collector who is well known for his intelligence is taking shelter under lame excuses. The learned counsel requested that the issue be decided finally by this Court.

3. On reading the counter affidavit of the District Collector and hearing the submissions of Mr.Giri, I suggested to Sri.Shaji Thomas Porkattil, counsel for the Panchayat that a trial run of the unit can be permitted to be made so that the Single Window Clearance Board or even this Court will have more convincing material on the basis of which the issue can be can be decided. Sri.Shaji Thomas would resist

the above suggestion tooth and nail. According to counsel, since it is clear from the counter affidavit of the District Collector that the petitioner has not been heard before Ext.P16 order was passed, what should be done is to direct the Single Window Clearance Board to have a reconsideration after hearing the petitioner also. Trial run will not serve any useful purpose since hazards resulting from pollution emanate only slowly and not from the first hour of the operation of the unit. Mr.Shaji invited my attention to Section 11 of the Statute to submit that this Court will not be justified in interfering with Ext.P16 when a very effective alternate remedy exists in favour of the petitioner. The learned counsel reminded me of the pronouncement of the Supreme Court in **Action Council v. Benny Abraham** (2001 (2) KLT 690) which inter alia lays down that the local authority is entitled on considerations of public interest to deny licence for the working of a unit even when all statutory clearances and permits have been obtained by the unit.

3. I am not impressed by the submissions of Sri.Shaji Thomas. According to me, the right of the entrepreneur to establish and operate the unit in accordance with statutory provisions, avoiding health hazards to the fellow-members of the citizenry is as important and fundamental as that of the other citizens to have a pollution free

life. Report on the basis of a trial run conducted properly under the supervision and surveillance of an impartial environmental scientist and the Environmental Engineer of the Kerala State Pollution Control Board, apart from the Public Health Authority of the District, will be of considerable assistance in the matter of settling the disputed question as to whether the running of the industry by the petitioner will generate pollution causing hazards to the health of the people of the area where the factory is proposed to be established. I am therefore inclined to permit and direct the conduct of a trail run of the petitioner's factory. I am informed that the building/buildings which have been put up in the premises of the petitioner are yet to be assigned door numbers by the Panchayat and that for want of door numbers, the Electricity Board has not granted connection to the buildings. The trial run of the unit will not be possible without electricity.

4. Under these circumstances, the following orders will be passed:-

1. The 5th respondent is directed to assign provisional numbers to the building or buildings put up by the petitioner in the premises where the petitioner proposes to start a latex centrifuging-cum-latex creaming unit—comprised in Sy.Nos.450/1 and 450/1-1 of Poovarani

Village, Meenachil Taluk, Kottayam District.

2. The Assistant Engineer, Electrical Section, Paika or any other Engineer having jurisdiction over the area is directed to grant industrial service connection to the buildings in question once they are assigned provisional numbers by the 5th respondent as directed above.

3. The 5th respondent will comply with the above direction within five days of receiving copy of this order and the Assistant Engineer, Electrical Section, Paika will within five days of receiving application for connection from the petitioner grant the connection applied for.

Issue a copy of this order to Advocate Sri.Jose J.Matheikel, Standing Counsel for the Kerala State Electricity Board in this Court who will communicate the order to the Assistant Engineer and ensure that the order is complied with by the Assistant Engineer.

Post on 7.3.2007 for further orders incorporating the details of the trial run to be permitted.

Hand over the order today itself.

**(PIUS C.KURIAKOSE, JUDGE)**

tgl/-

**PIUS C. KURIAKOSE, J.**

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W.P.(C) No.23928 OF 2006

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DATED THIS THE 6th NOVEMBER, 2006

**O R D E R**

Sri.Jobi Jose Kondody and Sri.V.Giri, as instructed by him, have addressed me in detail on the various aspects of the matter involved in this Writ Petition, particularly the binding nature of a final recommendation which is issued by the Kerala Industrial Single Window Clearance Board constituted under the K.I.S.W.C.Board and Industrial Township Area Development Act, 1999 (Act 5 of 2000). I do find considerable force in the submission of Sri.Giri that having regard to the constitution of the District Board under Section 4(3) of the said Statute by which the President of the local authority concerned is mandatorily to be the third Member on the Fifteen-Member Board, the final recommendation issued under Section 8(2) shall be binding on the Panchayat. However, I will be taking a decision on that question and also on the serious arguments raised by Sri.Giri regarding the inter-play between various provisions of the Kerala Panchayat Raj Act, 1994 and Act 5 of 2000, only when the Writ Petition is disposed of finally. I would have been inclined to accept the submission of Sri.Jobi Jose Kondody and Sri.Giri that at least

Ext.P10 should be construed as a final recommendation issued by the Single Window Clearance Board to the Panchayat to issue licence. But perusal of the records placed by the parties and also the files kept by the Single Window Clearance Board which have been made available before me will show that the 1st respondent-Chairman of the Single Window Clearance Board himself has taken steps to have a reconsideration of Ext.P10. Further inspections have been made and reports also obtained.

Under these circumstances, I am inclined to pass an interim order in the following terms:-

The 1st respondent-Chairman of the Single Window Clearance Board will place Ext.P13 and all the records pertaining to the petitioner's application for issuance of a final recommendation under Section 4(3) of Act 5 of 2000 in the very next meeting of the Single Window Clearance Board and facilitate a decision, i.e., a final recommendation to the 4th respondent Panchayat regarding issuance of licence to the petitioner. Notice regarding the next meeting shall be issued sufficiently early to the President of the 4th respondent-Panchayat so as to ensure that he also participates in the meeting. Decision will be taken considering all materials available and the rival contentions which may be urged in the meeting on behalf of the

petitioner and also on behalf of the Panchayat. The next meeting as directed above shall be convened at the earliest and at any rate within three weeks of receiving a copy of this order.

Hand over the order to both sides.

**(PIUS C. KURIAKOSE, JUDGE)**

tgl